

*In the Matter of Dirk Dority,
Assistant Supervisor, Parks
(PM1045D), City of Clifton*
DOP Docket No. 2004-3538
(Merit System Board, decided September 22, 2004)

Dirk Dority (petitioner), represented by Daniel J. Zirrith, Esq., petitions the Merit System Board to add his name to Certification #PL031704 and to rescind an appointment effected from that certification, pursuant to *N.J.A.C.* 4A:4-2.9(g), for Assistant Supervisor, Parks (PM1045D), City of Clifton.

By way of background, petitioner is presently employed by the City of Clifton in its Department of Public Works. In June, 2002, he applied for the above-noted promotional examination. On October 16, 2003, the Department of Personnel scheduled an examination for this position. At that time, petitioner was out of the country on vacation and was unable to take this examination. Pursuant to *N.J.A.C.* 4A:4-2.9, he thereafter requested and was granted a make-up examination, which he took on November 12, 2003. After passing the examination, his score was issued on November 21, 2003 and his name was added to the list of eligibles on December 1, 2003. On December 19, 2003, petitioner was notified that he passed the examination and that his name had been added to the list.

However, before his name was added to the list, the list was certified on November 24, 2003, *i.e.*, Certification #PL031704, without his name. Department of Personnel records reflect that this certification was issued with a disposition due date of February 24, 2004. As a result of this certification, the third-ranking non-veteran on the list, William C. Zerelik, received an appointment to the subject title, effective January 26, 2004, under the "Rule of Three." *See, N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3. It is noted that at the time of his permanent appointment, Mr. Zerelik was serving provisionally, pending promotional examination procedures, in the subject title.

It is further noted that there were a total of five eligibles, including Mr. Zerelik, on the certified list, four non-veterans and one veteran, who ranked fifth on the list. After petitioner's name (a non-veteran) was added to the list of eligibles, his score placed him in second place tied with another non-veteran, Patrick M. Doreus, Sr. Further, had petitioner's name appeared on the certification issued on November 24, 2003, Mr. Zerelik would not have been reachable for appointment under the Rule of Three and any one of the top three interested eligibles, including petitioner, would have been eligible for appointment.

In support of his request to have his name included in the original certification, petitioner argues that Mr. Zerelik's appointment should be rescinded because it was incumbent upon the Department of Personnel to reissue a corrected certification with petitioner's name on it and reflecting that he ranked number 2 on December 1, 2003. Further, if the City of Clifton received notice of petitioner's examination results and

ranking, it should have requested from the Department of Personnel a corrected certification following December 1, 2003. In this regard, petitioner notes that eight weeks passed from the time the certification was issued (November 24, 2003) to the time the appointment was effected (January 26, 2004), affording the Department of Personnel ample time to have issued a corrected certification before, in his view, an improper appointment was made. Petitioner notes that he had no reason to believe, at the point that he was notified that his name was added to the list, that his name would be placed on a separate list. Rather, he believed that he was ranked number 2 on the list that would be utilized to effect appointments.

In addition, relying on *N.J.S.A. 11A:1-2(a)* and *Communications Workers of America v. New Jersey Department of Personnel*, 154 N.J. 121 (1998), petitioner cites the strongly stated public policy, under the Civil Service Act and recognized by the Supreme Court of New Jersey, of selecting and advancing employees on the basis of their relative knowledge, skills and abilities and their abilities and merit. Petitioner contends that this important public policy would be undermined if Mr. Zerelik's appointment were allowed to stand. This is particularly the case when the individual appointed would not have been reachable for appointment had petitioner's name appeared on the November 24, 2003 certification.

William C. Zerelik, represented by Ciro A. Spina, III, Esq., argues as follows: 1) petitioner's request is untimely, since Mr. Zerelik was appointed on January 26, 2004 and petitioner did not file his request with the Department of Personnel until February 27, 2004, well beyond the 20-day timeframe allowed to appeal an alleged bypass of an eligible on a list under *N.J.A.C. 4A:2-1.1*; and 2) pursuant to the criteria set forth at *N.J.A.C. 4A:4-2.9(g)*, the non-inclusion of petitioner's name on the certification was not the result of any error on the part of the Department of Personnel or the City of Clifton and, accordingly, petitioner is not entitled to receive the appointment he seeks and Mr. Zerelik's appointment must be allowed to stand.

Responding to the first argument, petitioner notes that Mr. Zerelik did not provide any factual basis to support his claim that the appeal was untimely. In connection with the second contention, petitioner indicates that even if the appeal was untimely, pursuant to *N.J.A.C. 4A:1-1.2(c)*, the Commissioner of Personnel or the Merit System Board has authority to relax a rule in a particular situation in order to effectuate the purpose of Title 11A, New Jersey Statutes, citing *In the Matter of Deborah Hadala, Department of the Treasury* (Merit System Board, decided June 21, 1999). Moreover, petitioner notes that this 20-day timeframe is not a statutory requirement for this type of appeal and only statutorily set time limits for filing appeals are not subject to rule relaxation, such as appeals of discipline and of termination at the end of a working test period. Thus, petitioner concludes that the Board has authority to accept his appeal as timely.

N.J.A.C. 4A:4-2.9(g) provides that except for error by the Department of Personnel or appointing authority, prior appointments from the eligible list will not be affected by the addition of a name to the list.

CONCLUSION

Initially, regarding the timeliness of this appeal, *N.J.A.C.* 4A:2-1.1(b) provides that, unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. Mr. Zerelik was not appointed until January 26, 2004 and petitioner filed his request on February 27, 2004. Although it appears that petitioner's request may be untimely, the Board may nevertheless relax the above-noted rule, under *N.J.A.C.* 4A:1-1.2(c), to entertain the merits of the controversy since, as correctly stated by petitioner, this 20-day timeframe is not set by statute as are appeals from discipline or termination at the end of a working test period. See, *N.J.S.A.* 11A:2-15. In short, in the interests of fairness the Board sees no impediment to relaxing this rule and reviewing the merits of petitioner's request.

In the present matter, the critical question that the Board must address is whether, pursuant to *N.J.A.C.* 4A:4-2.9(g), there was any error on the part of the Department of Personnel or the appointing authority that would require the list at issue to be re-certified in order to rescind an appointment and appoint petitioner. For a variety of reasons, as will be seen below, petitioner has not provided any basis to grant him the relief he is requesting.

A review of the present record establishes that there is no evidence of administrative error by either the Department of Personnel or the appointing authority. The sequence of events, as they unfolded, reflect that petitioner was granted and took a make-up examination, his score and ranking were determined in a timely manner, and his name was added to the list of eligibles without undue delay. Further, neither the Department of Personnel nor the appointing authority had a legal obligation to issue or request, respectively, under these circumstances, a corrected certification. By the same token, there was also no obligation to withhold the issuance of a certification until petitioner's name was added to the eligibility roster, particularly in the present situation, where petitioner had taken a make-up examination due to his unavailability to sit for the initial test and where he was not provisionally serving in the subject title.

In addition to the foregoing considerations, there is also the question of the remedy to be fashioned in this case were petitioner's request granted. Assuming, *arguendo*, that petitioner's request were to be granted, a corrected certification would be re-issued with his name on it. Undoubtedly, under this scenario, Mr. Zerelik would not be reachable for appointment under the Rule of Three. However, neither would petitioner's appointment be mandated pursuant to this rule. It is well settled that a person who successfully passes an examination and is placed on an eligible list does not thereby gain a vested right to appointment. Rather, the only benefit inuring to such a person is that as long as that list remains in force, no appointment can be made except from that list. See, *In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984); *Lavitz v. Civil Service Commission*, 94 *N.J. Super.* 260 (App. Div. 1967). Pursuant to the Rule of Three, an appointing authority is granted broad discretion in appointing any one of the top three interested eligibles on a list. *In re Crowley, supra*; *Bulger v. Town of Harrison*, 93 *N.J.A.R.2d (CSV)* 509 (1993).

Further, to undo the appointment of an otherwise innocent party in a situation where petitioner's appointment is not mandated, would be to deprive an appointee of a vested property right without any justification. On the other hand, petitioner, as noted above, possesses no vested right to appointment. In short, no basis exists in the present record to grant petitioner's request.

ORDER

Therefore, it is ordered that this request be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.